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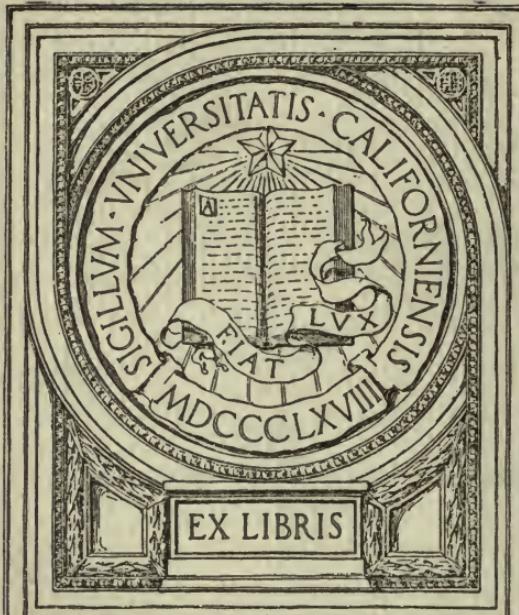
FEDERAL PROTECTION OF
MIGRATORY BIRDS

By Geo. A. Lawyer

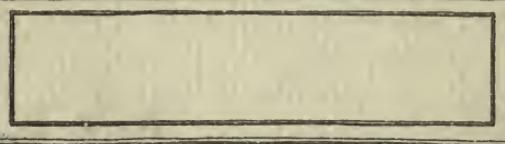
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CALIFORNIA

FEDERAL PROTECTION OF MIGRATORY BIRDS

BY

GEORGE A. LAWYER

Chief U. S. Game Warden, Bureau of Biological Survey

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OPINION OF
CALIFORNIA

FEDERAL PROTECTION OF MIGRATORY BIRDS.

By GEORGE A. LAWYER,

Chief U. S. Game Warden, Bureau of Biological Survey.

BIRD PROTECTION AN ECONOMIC QUESTION.

THE MYRIADS of migratory birds that fairly astounded the early explorers of this country before its virgin forests had been destroyed, its green fields trodden to dust by the feet of tramping millions, or its silences broken by the din of thousands of cities, have inspired the writing of volumes of literature. These volumes have told of the wanton and thoughtless slaughter of the birds, and have given warning of their certain disappearance with the settlement of the country and the usurpation of the forests, fields, and streams that had furnished shelter, food, and breeding places for these feathered hosts. Other volumes have set forth the steps that should be taken to save the birds from the ultimate extinction threatened by the acts of people ignorant of their real economic value, and have told of the annual destruction of millions of dollars' worth of forests and crops by injurious insects formerly kept under subjection by the birds. Yet all the while the birds were actually being exterminated, in spite of such protection as could be afforded by the laws of various States.

The food value and economic importance of the migratory birds of the United States, amounting to many millions of dollars annually, justify the widespread interest in their preservation. Not less important is the esthetic value of birds—the inspiration and stimulus which they give to the moral sense, and the charm and beauty which they lend to the life of all our people. Researches by the Bureau of Biological Survey into the economic value of insectivorous birds have proved that they insure the farmer against outbreaks of insect pests, a most serious menace to the agricultural wealth of the country. Valuable in other ways are the game birds, which not only furnish delightful and pleasing recreation to the great army of American sportsmen, but add materially to the food supply of millions of people.

STATE PROTECTION OF BIRDS.

The measures necessary to insure adequate protection for bird life have been well known, but diversified and selfish

AGRICULTURE

interests have prevented the States from putting these measures into effect. The protection of birds during the mating season and while on their way to and from their breeding grounds has been of prime importance, but until recent years few States have given much attention to this important matter. In fact, any protection by a closed season on hunting is in a large number of States comparatively recent, owing to the generally accepted but erroneous belief that migratory birds need no protection and can be hunted whenever present from the time they make their first appearance in spring and fall.

The growth of sentiment for the conservation of so valuable a resource by preventing destruction through spring shooting of game birds, and by enacting other protective measures, has been notable in the last half century. The number of States affording waterfowl no legal protection has come to be in inverse ratio to the number prohibiting all spring shooting, while between these extremes are all gradations, including partial protection of all species and the permission of more or less spring shooting. The various phases are readily compared by decades in the accompanying tabulation covering the 10-year periods since 1870:

State protection of waterfowl at the end of 10-year periods from 1870 to 1910 and in 1912 and 1918, as reflected by various phases of legislation of the 48 States or of legislation for the territory now covered by them.

Phases of legislation.	Number of States in the years—						
	1870	1880	1890	1900	1910	1912	1918
Prohibiting all spring shooting.....	1	2	5	9	14	18	31
Prohibiting all spring shooting but protecting only a few species.....	5	3	1	1	.....	.....	.....
Prohibiting spring shooting of a few but protecting all species.....	.....	.....	1	1	2	1	.....
Permitting spring shooting but protecting only a few species.....	.....	2	1	1	1	.....	.....
Permitting spring shooting but protecting a few or all species locally.....	.....	.....	.....	.....	1	1	1
Permitting spring shooting but protecting all species.....	6	17	23	26	24	25	13
Affording no legal protection whatever.....	36	24	17	10	6	3	3

The number of States making efforts to prohibit spring shooting fluctuated from year to year, and some States frequently changed columns. Furthermore, the progress was slow and uncertain, and the laws were not always well enforced. In this progress, our shorebirds have been among the most sadly neglected. Many of the smaller species have not been protected in spring. It thus appears that while birds are adequately protected by the laws of some States, their migratory instincts and seasonal movements are such that the open seasons under State laws added together permit birds to be killed over parts of their entire range during every month of the year.

Unreasonably long open seasons for wild fowl prevail in 13 States, varying in length from five to seven and one-half months. No species can long withstand the drain of incessant shooting during such long open seasons; and the destruction of the breeding grounds of the birds, the increased number of hunters, modern firearms, and improved methods of transportation to regions hitherto remote have made practically certain the utter extermination of our migratory birds if they receive only such protection as the States alone are able to afford.

FEDERAL MIGRATORY-BIRD LAW OF 1913 AND ITS REPEAL.

The long and futile efforts of the States finally convinced State game commissioners, sportsmen, conservationists, and others that the uniform and adequate preservation of migratory birds and an equalization of hunting opportunities depended upon the exercise of a supervisory jurisdiction on the part of the Federal Government. To this end a bill was introduced in Congress in 1904, but it was so novel in its objects and legal character that it failed of passage. From the time of its introduction, however, the subject was kept before Congress in one form or another almost continuously until the enactment of the migratory-bird law of 1913.

This Federal statute merely conferred on the United States Department of Agriculture the power to fix closed seasons during which it would be unlawful to capture or kill migratory birds. For this reason, it proved very imperfect and

quite incapable of effective enforcement, but it exerted a wonderful influence upon the public mind, and its passage laid the first real foundation for the actual preservation of our migratory birds.

The regulations adopted under this act enjoined spring shooting throughout the United States, and the extent of their observance is a splendid tribute to the sportsmen of the country. Fully 95 per cent of the sportsmen abided by this mandate and refrained from hunting during the closed seasons. The result was almost instantaneous. Waterfowl and other migratory game birds at once not only showed a marked increase in numbers, but, owing to the cessation of spring shooting, remained unmolested in ever-increasing numbers to breed in places from which formerly they had been driven every spring by incessant shooting. At the end of the 5-year period during which this law was in operation, State game commissioners, leading sportsmen, and conservationists were practically unanimous in their expression that wild fowl were more abundant than at any time in the 25 years preceding, and in attributing this increase to the abolition of spring shooting and the general observance of the Federal statute.

The very marked improvement in conditions under this law instilled a new spirit into sportsmen and showed the wonderful possibilities under a Federal law broad and comprehensive enough not only to protect the birds during the mating and breeding season, but to equalize hunting privileges and opportunities by removing the incongruities still existing under State laws.

The constitutionality of the law was attacked in the courts, but before it was passed upon by the United States Supreme Court the law was repealed by the enactment of more effective legislation in 1918. The constitutionality of the law of 1913 thus became a dead issue and on motion of the Attorney General the appeal in the case¹ was dismissed on January 6, 1919. In its action the court did not pass upon the constitutionality of the law and this now remains a moot question.

¹ United States *vs.* Harry Shauver.

THE MIGRATORY-BIRD TREATY.

When the migratory-bird law was passed, sportsmen and conservationists had in mind the enactment not only of a more comprehensive Federal statute but of uniform international legislation, such legislation as would insure adequate protection to birds on their breeding grounds and in their winter homes. To this end the United States Senate in 1913 adopted a resolution memorializing the President to negotiate treaties with other countries for the protection of migratory birds. As a result of negotiation thus initiated a treaty between the United States and Great Britain for the protection of birds migrating between the United States and Canada was concluded at Washington, August 16, 1916, and ratified December 7 of the same year. Altogether, 537 ✓ species of migratory birds are included in the various families protected by the treaty, and all individual birds of each of these families or species are included, even though a few individuals may be found within the borders of any State the entire year. In other words, if a few individuals of any species of migratory bird remain for an indefinite period in a particular State this fact does not take from them their migratory character and thus remove them from the operation of the law.

BIRDS NOT PROTECTED BY THE TREATY.

The treaty does not, however, include the gallinaceous birds, as quail, pheasants, grouse, and wild turkeys, and these still remain wholly within the jurisdiction of the several States. Approximately 220 species of migratory birds also are excluded from the terms of the treaty because they are not specifically named or do not feed chiefly or entirely on insects. Included among the unprotected birds are the skimmer, albatross, tropic bird, anhinga, cormorant, pelican, man-o'-war bird, flamingo, roseate spoonbill, ibis, jabiru, limpkin, hawk, owl, parrot, trogon, kingfisher, becard, horned lark, crow, jay, starling, blackbird, sparrow, phainopepla, thrasher, and mockingbird.

TERMS OF THE TREATY.

The treaty provides for continuous protection for migratory insectivorous birds and certain other migratory non-game birds; special protection for 5 years for wood ducks and eider ducks; a 10-year closed season for band-tailed pigeons, little brown, sandhill, and whooping cranes, swans, curlews, willet, upland plover, and all other shorebirds (except black-bellied and golden plovers, Wilson snipe or jack-snipe, woodcock, and the greater and lesser yellow-legs); and confines hunting to seasonable periods of not exceeding three and one-half months for the shorebirds not given absolute protection, and other migratory game birds.

THE MIGRATORY-BIRD TREATY ACT.

The treaty provides no machinery to enforce its provisions, but the High Contracting Powers agreed to enact necessary legislation to insure its execution. In pursuance of this agreement, the Government of the Dominion of Canada passed the migratory-birds' convention act, which became a law on August 29, 1917; and the Congress of the United States passed the migratory-bird treaty act, approved by the President on July 3, 1918. The enactment of this legislation rounded out the most comprehensive and adequate scheme for the protection of birds ever put into effect.

Under the migratory-bird treaty act, it is unlawful to hunt, capture, kill, possess, sell, purchase, ship, or transport at any time or by any means any migratory bird included in the terms of the treaty except as permitted by regulations which the Secretary of Agriculture is authorized and directed to adopt, and which become effective when approved by the President. The act provides police and other powers necessary for its effective enforcement.

CONSTITUTIONALITY OF THE TREATY ACT.

If it is conceded, as it must be, that valuable game and insectivorous birds which migrate between the United States and Canada are a proper subject for the negotiation of a treaty, there seems to be little likelihood that the migratory-

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PLATE I.

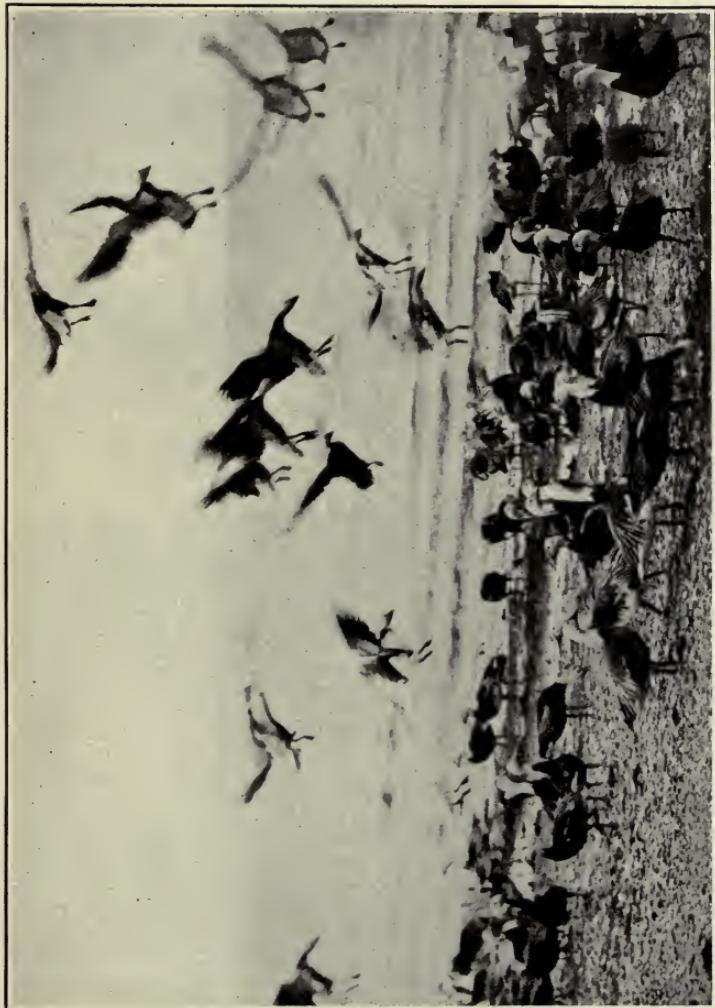


PHOTO BY HERBERT K. JOB. B1123M

RESULTS OF PROTECTION OF MIGRATORY BIRDS.

Blue and snow geese at Vermillion Bay, La. (Photograph used by courtesy of the National Association of Audubon Societies.)

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Yearbook U. S. Dept. of Agriculture, 1918.

PLATE II.



PHOTO BY HERBERT K. JOB. BII47M

FIG. 1.—SCENE IN A TYPICAL HUNTING SECTION OF THE NORTHWEST.

Mallards in slough by Lake Winnipegosis, Manitoba.



PHOTO BY HERBERT K. JOB. BII46M

FIG. 2.—LESSER SCAUP DUCKS, PALM BEACH, FLA.

When protected, wild ducks become remarkably tame.



PHOTO BY HERBERT K. JOB, BI124M

A SCENE THAT THRILLS THE HUNTER.

"Pintails! Get down! Here they come!"

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bird treaty act of July 3, 1918, will be effectively attacked on the grounds of constitutionality, because the Constitution of the United States provides that ". . . all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

EFFECT OF THE TREATY ACT ON STATE LAWS.

The migratory-bird treaty act renders inoperative all State and local laws that are inconsistent with it, but it authorizes the several States to make and enforce laws not inconsistent with the terms of the act or of the treaty, which shall give further protection to migratory birds and their nests and eggs; but the open seasons may not be extended by the States beyond the dates fixed by the Federal regulations.

The Federal Government in effect has assumed a limited jurisdiction over migratory birds in order to insure their adequate protection. The States may not permit anything to be done which is prohibited by the Federal Government, but they may enact and enforce laws or take other measures conforming to the provisions of the Federal regulations or not in conflict with the operation of the Federal law.

It seems quite clear that no State or subdivision of a State can permit migratory birds to be hunted, killed, possessed, sold, or transported at times, by means, or in numbers made unlawful by the Federal act, but confusion arises from the existence, at the time of the enactment of the Federal statute, of closed seasons under State laws which overlapped either wholly or in part the open seasons prescribed by the Federal regulations. If it is clear that a person is not authorized to hunt migratory birds during that portion of a State open season which is a part of a Federal closed season, it must be equally clear that a person may not hunt during that portion of the Federal open season which is included in the State closed season, as hunting during that time would be in violation of a law which the State is authorized to make and enforce.

To ascertain the period when migratory birds may be hunted without violating either Federal or State laws, there

must be deducted from the Federal open season that portion of a State closed season which is included in it.

The right of a State to circumscribe the privileges permitted by the Federal regulations extends also to daily bag limits, possession, transportation, and export of birds. Persons committing acts permitted by the Federal regulations but prohibited by State laws are amenable, however, to the State, and are not subject to prosecution by the Federal Government.

INTERSTATE AND INTERNATIONAL TRAFFIC IN BIRDS.

That portion of the United States Penal Code known as the Lacey Act, which prohibits the illegal interstate shipment by common carrier of dead bodies of wild birds, has also been superseded by the treaty act, which prohibits the carriage or shipment of both dead and live birds (migratory as well as nonmigratory) out of a State by any means whatever contrary to the laws of the State in which the birds were killed, or from which they were carried or shipped.

The provision of the Lacey Act relating to the interstate shipment of wild animals and parts thereof and the penalty for knowingly receiving illegal shipments still remain in force.

REGULATIONS UNDER THE TREATY ACT.

The first regulations under the migratory-bird treaty act were adopted by the Secretary of Agriculture, after careful consideration of recommendations and suggestions, and became effective on the approval of the President, July 31, 1918. Amendments were adopted effective October 25, 1918.

The regulations are prepared by the Secretary of Agriculture, with the assistance of the Bureau of Biological Survey and an advisory board of 21 members representing all sections of the country, a majority being State game commissioners or their representatives and the remainder well-known sportsmen and conservationists of wide experience. The members of the board possess no administrative or executive powers, but their thorough knowledge of conditions and requirements enables them to offer valuable suggestions in connection with the preparation of the regulations. Regulations thus prepared are calculated not only to give ade-

quate protection to the birds, but also the highest degree of satisfaction to the greatest number of sportsmen and others interested in the conservation of our migratory birds.

SEASONS FOR KILLING MIGRATORY BIRDS.

The only migratory game birds that under the regulations may be lawfully hunted are waterfowl (except wood duck, eider ducks, and swans), rails, coot, gallinules, black-bellied and golden plovers, greater and lesser yellow-legs, woodcock, Wilson snipe or jacksnipe, and mourning and white-winged doves. Practically uniform periods, not exceeding three and one-half months, between September 1 and February 1, are prescribed as the open seasons for hunting these birds, except that the open season for black-bellied and golden plovers and greater and lesser yellow-legs in the States bordering on the Atlantic Ocean and situated wholly or in part north of Chesapeake Bay is from August 16 to November 30 (figs. 1 and 2).

RESTRICTIONS ON TAKING, POSSESSING, AND TRANSPORTING BIRDS.

Under the law and regulations, it is unlawful to capture or kill migratory game birds, except with a gun not larger than No. 10-gauge, or to hunt, kill, or attempt to hunt or kill birds from airplanes, power boats, sailboats, or any boat under sail. Power boats and sailboats may be used to take gunners to and from the hunting grounds, but shooting or attempting to shoot migratory birds from them is prohibited. Nor can such boats be used to harry, worry, or disturb the birds in any manner.

Uniform bag and export limits are fixed by the regulations. Under the export regulations, not exceeding two days' bag limit may be sent out of a State by one person in one calendar week. No restrictions are placed on the number of birds that may be shipped within the limits of a State, such shipments being governed entirely by State laws.

Any package in which migratory game birds or parts thereof are transported or carried, whether within or without a State, must have conspicuously marked on the outside the names and addresses of shipper and consignee and an accurate statement of the numbers and kinds of birds contained.

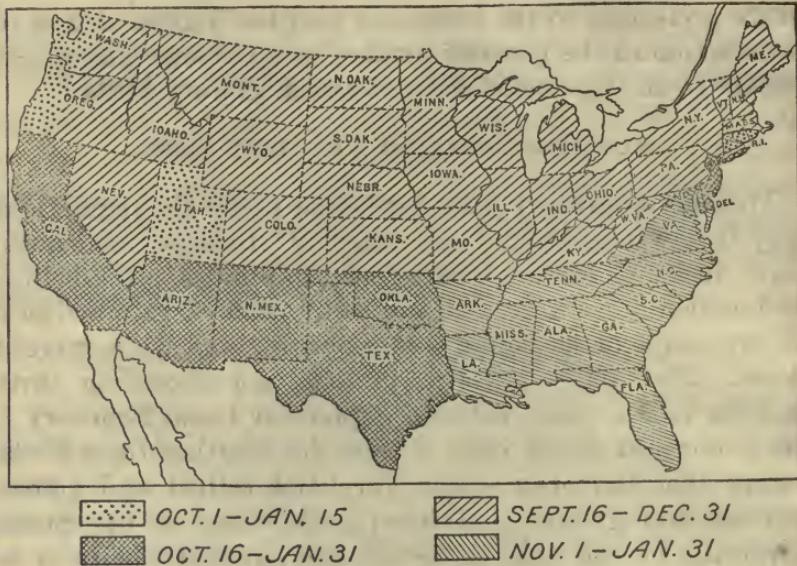


FIG. 1.—Open seasons fixed by Federal regulations adopted in 1918 for waterfowl (except wood duck, eider ducks, and swans), coot, gallinules, and Wilson snipe or Jacksnipe. Wood ducks, eider ducks, and swans are protected for a term of years under the provisions of a treaty between the United States and Great Britain for the protection of birds migrating between the United States and Canada.

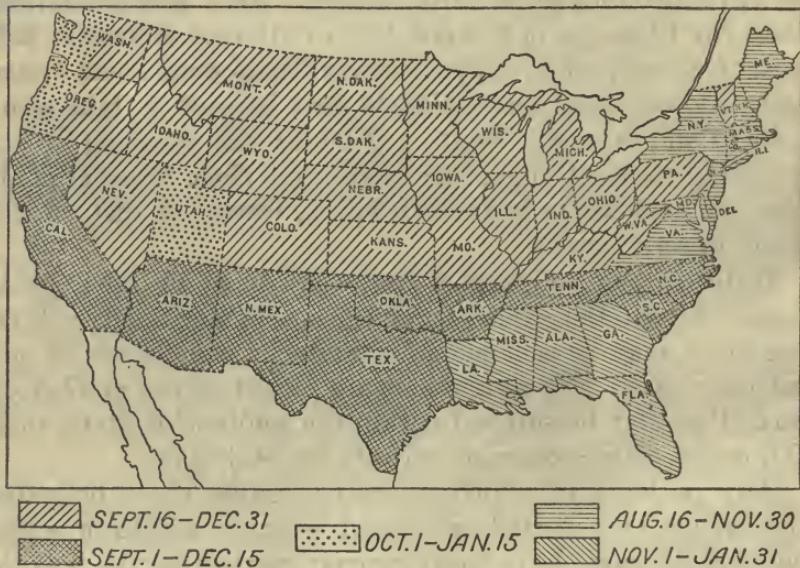


FIG. 2.—Open seasons fixed by the Federal regulations adopted in 1918 for black-bellied and golden plovers and greater and lesser yellow-legs.

SALE OF MIGRATORY BIRDS PROHIBITED.

The hunting of migratory game birds for the market has contributed perhaps more than any other cause to the depletion of the supply, and has created an almost universal demand for laws prohibiting their sale. As a necessary measure to conserve the supply and increase the breeding stock, the regulations do not provide for the sale of any migratory birds, except for scientific or propagating purposes under permit, and as a consequence it is unlawful to sell wild ducks or other migratory birds for commercial purposes anywhere in the United States. For many years most States have had laws prohibiting the sale of game during part or all of the year, but the open markets in near-by States made it profitable for the market hunter to continue in his destructive vocation, as it was always possible for him surreptitiously to ship the birds to the markets where they could be sold lawfully. The closing of the markets will make it more difficult to dispose of the birds and will remove the incentive to slaughter them in such large numbers. This prohibition against the sale of migratory birds has been very generally approved by sportsmen and conservationists and by the United States Food Administration.

GAME FARMING.

The general prohibition against the sale of migratory birds has created a great demand for domesticated birds to supply the market. To meet these demands, the regulations under the treaty act make suitable and liberal provisions for the propagation of migratory waterfowl. These provisions apply to all persons who possess migratory waterfowl for any purpose.

Permits are issued free of charge by the Secretary of Agriculture, through the Bureau of Biological Survey, authorizing persons to acquire a limited number of wild waterfowl, to be used as the nucleus of a breeding stock or to strengthen the strain of birds already possessed, and to possess and traffic in domesticated migratory waterfowl for food purposes.

Aside from the necessity of obtaining Federal permits, marking packages in which the birds or eggs are shipped, and reporting to the Secretary of Agriculture on operations

under the permits, the breeding and traffic in the birds is carried on entirely under the supervision of the several States.

The fact that many States have enacted no laws on the subject, together with lack of uniformity in the laws of other States, has deterred many persons from engaging in the business, but it has been demonstrated that many species of waterfowl, particularly black and mallard ducks, can be raised profitably on lands unsuited to agriculture and also in connection with agricultural pursuits. There seems to be a growing sentiment in favor of more uniform legislation on the subject in order that domesticated birds may reach the markets with the least inconvenience to the breeders, while at the same time the protection of wild birds may be safeguarded properly. This could be accomplished in a simple and inexpensive manner if a marking and tagging system, similar to one that has been in successful operation in New York State for many years, were adopted. Enactment of proper laws by all States, giving full recognition to this legitimate business, would encourage persons to propagate wild fowl in captivity, thus materially adding to the food supply and affording a pleasant and profitable occupation for a large number of people.

CONTROL OF BIRD DEPREDATIONS.

Despite the almost general usefulness of birds, certain species at times become seriously injurious to crops in some localities. Recognizing the importance of controlling such depredations, the regulations make suitable provision for the issuance of permits to kill any migratory birds which become seriously injurious to agricultural or other interests, but the birds so killed can not be shipped or sold.

The control of the depredations of wild ducks in the rice fields of California during the fall of 1918 furnishes a striking example of the successful operation of this provision of the law. After a careful investigation of conditions in the rice belt, a blanket Federal permit was issued authorizing rice growers to kill wild ducks when necessary to protect the rice from damage. This permit insured the rice growers protection from the destruction threatening their crops, while the restrictions carried in the permit regarding shipment and sale afforded the birds ample protection.

In the Southeastern States a similar destruction of rice fields has threatened in the invasions of hosts of bobolinks, commonly known there in fall as rice birds and farther north as reed birds. During the spring and summer months the bobolink renders valuable services as a destroyer of injurious insects, but late in the summer and in fall it changes its habits and inflicts serious damage to crops, especially in certain Southeastern States, where rice growing has again begun to flourish. An investigation by the Biological Survey showed that the depredations of the bobolink in the fall of 1918 resulted in losses to rice growers in this section of about \$150,000. The birds descended on the rice fields in such numbers and were so heedless of efforts to drive them away that it was apparent that the only effectual remedy would be to shoot them when in the rice belt and when migrating in that direction.

The Secretary of Agriculture, therefore, issued a permit on January 17, 1919, authorizing the shooting of bobolinks from one-half hour before sunrise to sunset from September 1 to October 30 in New Jersey, Pennsylvania, Delaware, Maryland, and the District of Columbia; and from August 16 to November 15 in Virginia, North Carolina, South Carolina, Georgia, and Florida. Birds so killed are not to be sold, offered for sale, shipped for sale, or wantonly destroyed. They may be used as food by persons killing them or they may be transported for the use of hospitals or charitable institutions. It is believed that action taken under this permit will insure rice growers against the depredations of the bobolink without endangering the species.

ADMINISTRATION OF THE LAW.

In the Bureau of Biological Survey, which has direct charge of the enforcement of the law, are many unusual advantages for administering its provisions. For years this bureau has been investigating the relation of birds to agriculture, their breeding habits, and the times and lines of their migratory flights. It now has about a million and a half migration cards covering a period of nearly 35 years, constituting undoubtedly the most valuable record of this kind in existence. It is also well equipped through its corps of experts and hundreds of collaborators in all parts of the

country to carry on these investigations. A situation presented by unusual conditions occurring in any part of the country is carefully investigated and its relation to conditions in other localities determined. The results of these investigations are disseminated through bulletins and other channels for the benefit of the people of all parts of the country. The bureau is now maintaining most cordial relations with the game authorities of nearly all States, and its entire policy is along the line of assisting States to build up and maintain their bird resources.

FUTURE OUTLOOK FOR MIGRATORY BIRDS.

The Federal laws that have been enacted for the protection of migratory birds will, without doubt, go a long way toward insuring a supply for all time, but the interests of the several States are so inseparably related to the interests of the National Government that all efforts to conserve these birds should be coordinated if the fullest measure of success is to be attained. Much already has been done along this line. The open seasons for wild fowl in 25 States have been made to conform to the seasons under the Federal regulations, and in many other States game commissioners and sportsmen have manifested a spirit of cooperation in game conservation that fairly indicates a very general sentiment favoring uniformity in State and Federal laws.

While the results already achieved are very gratifying, the future promises to restore our migratory birds to such numbers as will afford abundant legitimate sport, recreation, and enjoyment for all the people.



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